

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 2000-F-08

Date issued: February 18, 2000

Requested by: Fabian Noack, Foster County State's Attorney

- QUESTIONS PRESENTED -

I.

Whether a county may use N.D.C.C. § 24-07-03 to close travel on a section line easement on which there is an improved road.

II.

Whether a governmental entity must bring condemnation proceedings when building a road along a closed section line easement.

III.

Whether the published notice of a meeting of a county planning commission and board of county commissioners was adequate.

- ATTORNEY GENERAL'S OPINIONS -

I.

It is my opinion that a county may use N.D.C.C. § 24-07-03 to close travel along a section line easement where there is an improved road only after the road has been vacated. It is my further opinion that any improved road on a section line easement may only be closed by the governmental agency having statutory jurisdiction over the road.

II.

It is my opinion that neither the state nor its political subdivisions must bring condemnation proceedings before constructing an improved road along a closed section line easement because the easement is held in perpetual trust for the benefit of the public.

III.

It is my opinion that the sufficiency of the notice is a question of fact which this office may not address.

- ANALYSES -

I.

As a preliminary matter, the laws passed by the North Dakota Legislature concerning roadways vary and often are conflicting, and many of them relate to highways which are built on private lands and not on section lines. Small v. Burleigh County, 225 N.W.2d 295, 297 (N.D. 1974). Thus, care needs to be taken not to generalize too broadly from the wording or language used in one statute addressing roadways when interpreting other statutes addressing roadways. See Satz v. Heiser, 240 N.W.2d 67, 72 (N.D. 1976). (Supreme Court finds "complete inconsistency" between statute permitting fencing of section lines and statutes relating to section lines incorporated into interstate, state, county, and township roads.)

The United States offered easements for travel on section lines to the Dakota Territory in 1866; this offer was accepted and has not been surrendered. See Ames v. Rose Township Bd. of Township Supervisors, 502 N.W.2d 845, 847 (N.D. 1993). The congressional section lines are deemed to be public roads in all townships of this state outside the limits of incorporated cities and outside platted and newly recorded townsites, additions, or subdivisions, and are open for travel to the width of 33 feet on each side of such section line. N.D.C.C. § 24-07-03. The interest acquired by the state and the public in the lands within 33 feet on either side of congressional section lines is that of an easement only and ownership remains in the landowner. See Wallentinson v. Williams County, 101 N.W.2d 571 (1960).

These congressional section lines, outside the limits imposed by N.D.C.C. § 24-07-03 and unless closed by proceedings permitted by statute, are open for public travel even if the easement has not been improved or surfaced. See Small, 225 N.W.2d at 300. There is no duty on the part of any governmental agency to provide an improved road on the section line easement. DeLair v. County of LaMoure, 326 N.W.2d 55, 60-61 (N.D. 1982). This office previously stated that the "right of travel on a section line easement is distinct and separate from the decision whether to improve a section line easement by creating a gravel or hard surfaced roadway." 1996 N.D. Op. Att'y Gen. 111. The distinction between the easement for travel along a section line and the decision by the state or a political subdivision to build an improved road along the section line easement is a crucial element when analyzing statutes to resolve issues involving section lines.

Statutes regarding section line easements are generally viewed as distinct and separate from the statutes concerning the creation of improved roadways. Amendments to a statute concerning section line easements were determined to neither directly amend nor repeal by implication statutes concerning the jurisdiction and authority of township boards to open, vacate, or change highways or to alter or discontinue any road or to lay out any new road. Letter from Attorney General Helgi Johanneson to Thomas E. Rutten, April 11, 1969. A board of township supervisors may close an improved township road located on a section line, but the public's right to travel the section line may only be closed under N.D.C.C. § 24-07-03. Letter from Attorney General Nicholas Spaeth to Charles D. Orvik, Sept. 11 1986. Therefore, provisions of law addressing the right to travel on an unimproved section line easement are distinct, separate, and independent of the authority of various governmental jurisdictions to open, vacate, or change improved highways, or to alter or discontinue or lay out an improved road.

This office has issued numerous opinions concerning the closure of section line easements and the closure of improved roads on section line easements. Several of these opinions did not distinguish between the section line easement and an improved road located on a section line easement, and should be supplemented by this opinion. In an April 11, 1969, opinion to Thomas E. Rutten, Attorney General Helgi Johanneson stated that a township could use N.D.C.C. §§ 24-07-04 and 24-07-05 to close a road along a section line easement in addition to the county's authority to close a section line road under N.D.C.C. § 24-07-03, without any discussion of the difference between closing an improved road which is a part of the township road system and closing the right of travel along an unimproved section line. This letter should be deemed to have been supplemented by a subsequent letter from Attorney General Nicholas Spaeth to Charles D. Orvik, Sept. 11, 1986, stating that the board of township supervisors may close an improved township road located on a section line but that this does not affect the public's right to travel the section line.¹

¹ Subsequent to the 1986 Spaeth opinion, a letter from an attorney in this office attempted to distinguish N.D.C.C. § 24-07-03 from N.D.C.C. §§ 24-07-04 and 24-07-05 on the basis that section 24-07-03 was a specific statute which applies to section line roads while sections 24-07-04 and 24-07-05 only apply to township roads which are not located on a section line. Letter from Assistant Attorney General Terry L. Adkins to Jerry Renner, March 27, 1990. This analysis contradicts both the 1969 Johanneson opinion and the 1986 Spaeth opinion, and also fails to acknowledge the North Dakota Supreme Court's determination that the legislature assigns specific duties regarding roads to different political subdivisions, and to this extent does not reflect the considered opinion of this office.

This office has also cautioned that the only means of preventing travel along a section line easement is provided by N.D.C.C. § 24-07-03, and that the permitted closure of roads by political subdivisions under N.D.C.C. §§ 24-07-04 and 24-07-05 do not close travel along the section line. 1996 N.D. Op. Att'y Gen. 111. To the extent that isolated statements in 1996 N.D. Op. Att'y Gen. 111 may be perceived as stating otherwise, that perception is not accurate.

The allocation of authority governing roads and highways is a matter of legislative prerogative. The Supreme Court "has previously held that highways belong to the state." Zueger v. Boehm, 184 N.W.2d 901, 904 (N.D. 1969); King v. Stark County, 266 N.W. 644, 656 (N.D. 1936) ("The highways belong to the state."). Further:

The state has control over its highways in its sovereign capacity, as represented by the legislature, and it may exercise its power directly or delegate it to any properly constituted body.

Zueger, 164 N.W.2d at 905. See also Chandler v. Hjelle, 126 N.W.2d 141, 147 (N.D. 1964), Morton County v. Forester, 168 N.W. 787, 788 (N.D. 1918).

The North Dakota Legislature has delegated its sovereign control over highways within the state to various political subdivisions. Cities have been delegated authority over streets, sidewalks, and public grounds. N.D.C.C. § 40-05-01(8). The board of county commissioners for each county has been given the "sole authority and responsibility" concerning the county road system as designated and selected by the county board. N.D.C.C. § 24-05-17. Likewise, townships have authority to construct and maintain township roads. N.D.C.C. §§ 58-03-07(12) and (13), 58-12-03. Further, the state highway system is under the control of the director of the Department of Transportation. N.D.C.C. § 24-01-03. Each of these separate levels of government has been delegated legislative authority to construct improved roads within their appropriate jurisdiction.

The separate exclusive jurisdiction held by the state, counties, cities, and townships over their own highway systems may be demonstrated by examining two cases decided during the early development of improved highways in this state. In Morton County v. Forester, the county brought an action against a landowner to clear an obstruction from a road and the landowner responded that the township had discontinued and vacated the highway. 168 N.W. at 787-788. The North Dakota Supreme Court held that the sole jurisdiction over the highways belonging to the township resided with the board of township supervisors. Id. at 790. Therefore, when the township road was vacated by the board of township supervisors, it no longer existed and

the defendant had not obstructed a highway. Id. Similarly, in Morton County v. Hughes Electric Co., 208 N.W. 108 (N.D. 1926), the State Highway Commission approved construction of an electric transmission line along a state highway and state bridge that were under its jurisdiction. The county brought an action seeking to enjoin the electric company from constructing this transmission line because the company had not obtained permission to do so from the county. The Supreme Court held:

The Legislature has clearly evidenced an intention that state highways shall be under the sole control and supervision of the state highway commission, and that the several counties and townships through which such highways pass shall have no right of control over them. The Legislature has indicated in the most unmistakable terms both the existence and the limit of the powers of local boards, such as boards of county commissioners and township supervisors, as regards highways under the care and supervision of such local boards, and it has also in equally plain terms indicated both the extent of, and the limits upon, the power of the state highway commission as regards to state highways. The statutes clearly indicate that the Legislature intended that, so far as state highways are concerned, there shall be no divided responsibility. It placed such highways under the sole control and supervision of the state highway commission.

Id. 208 N.W. at 111. The road system established by a political subdivision or the state under legislative authority may not be interfered with by other political subdivisions or the state unless also acting under legislative authority.

Therefore, it is my opinion the procedures in N.D.C.C. § 24-07-03 to close travel along a section line easement may be used only after any existing road has been vacated. It is my further opinion that an improved road built by a political subdivision or by the state may only be closed under statutory authority resting with the entity having jurisdiction over that improved road as part of its highway system. The only method by which travel along a section line easement may be entirely prevented when an existing improved road is located along that easement is for the road to be closed by the entity having jurisdiction over the improved road, and then the county, pursuant to N.D.C.C. § 24-07-03, to close travel along the section line easement if authorized by the terms of that statute.

II.

"[T]he right of passage on open section lines belongs to the public and cannot be alienated by the state, which holds the section lines as trustee for the public." Burleigh County Water Resource Dist. v. Burleigh County, 510 N.W.2d 624, 627 (N.D. 1994). The North Dakota Supreme Court has expressed doubt that the Legislature has authority to waive the section line right of way granted by Congress because the state does not own the right of way but merely holds it as a trustee for the public. Wenberg v. Gibbs Township, 153 N.W. 440, 442 (N.D. 1915). This office previously determined that:

The closure of a section line road contemplated by N.D.C.C. § 24-07-03 provides only for the temporary closure of the section line easement for purposes of travel, and the section line easement may subsequently be reopened for travel pursuant to N.D.C.C. §§ 24-07-04 and 24-07-05, 1994 N.D. Op. Att'y Gen. L-134.

1996 N.D. Op. Att'y Gen. 111. Further, this office has also stated:

[G]iven the unique status of section lines and the North Dakota Supreme Court's previous application of the public trust doctrine to such easements, N.D.C.C. § 24-07-03 must be construed as providing only for the temporary, albeit indeterminate, closure of section lines. See Letter from First Assistant Attorney General Paul M. Sand to John Romanick, McLean County State's Attorney (July 6, 1972); 1976 N.D. Op. Att'y Gen. 146; 1976 N.D. Op. Att'y Gen. 142. . . . N.D.C.C. § 24-07-03 does not provide for the relinquishment of the public rights of way but rather only the "closure" of section lines under certain circumstances. Therefore, no condemnation proceedings would need to be instituted in order to reopen a section line previously closed pursuant to N.D.C.C. § 24-07-03.

1994 N.D. Op. Att'y Gen. L-134 (Apr. 29 letter to Mahoney). Therefore, it is my opinion that neither the state nor its political subdivisions are required to bring condemnation proceedings before constructing an improved road within a section line easement even where that easement was previously closed.

However, under certain circumstances, the county may exercise its discretion to not order the removal of partial obstructions by a landowner along a section line easement. Burleigh County Resource Dist. v. Burleigh County, 510 N.W.2d 624, 628 (N.D. 1994) (house partially within section line easement). Although N.D.C.C. § 24-07-03 only permits farming and related activities on a closed section line

easement, and a landowner granted permission for an obstruction, as occurred in the above case, has no right to rely upon continued forbearance, it would be a good practice for the county to warn landowners that the easement is permanent. 1996 N.D. Op. Att'y Gen. L-239 (Dec. 19 letter to Feland).

III.

Your question concerning the adequacy of notice to the public provided for a combined meeting of the Foster County Planning & Zoning Commission and the County Commission concerning closure of a portion of a section line is a question of fact upon which this office may not issue an opinion. 1999 N.D. Op. Att'y Gen. 10; 1997 N.D. Op. Att'y Gen. 69; 1994 N.D. Op. Att'y Gen. 96. However, a planning and zoning commission created under N.D.C.C. ch. 11-33, appears to have no jurisdiction to open or vacate a highway under N.D.C.C. § 24-07-04 or to accept a petition for laying out, altering, or discontinuing roads under N.D.C.C. § 24-07-05, and does not have the authority to close the right of travel on a section line easement under N.D.C.C. § 24-07-03. In the event that there is an improved road on this section line easement, the appropriate jurisdiction must first vacate or discontinue that improved road. The county commission would have authority under N.D.C.C. § 24-07-03 to close the right of travel along the section line easement if there is not an improved road on that easement.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the questions presented are decided by the courts.

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